Lim Tian Hua (as receiver and manager of Carah Enterprise Sdn Bhd) v Ketua Pengarah Hasil Dalam Negeri

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-17 OF 1997

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD AND PS GILL JJCA

5 NOVEMBER 2002

Companies and Corporations — *Receivership — Priorities — Income tax due — Whether payment of income tax had priority over payments to be made to debenture holder — Companies Act 1965 ss 191, 292*

Revenue Law — *Income tax — Payment of tax — Taxpayer under receivership — Whether payment of income tax had priority over payments to be made to debenture holder — Whether Income Tax Act 1967 accorded priority for payment of income tax — Income Tax Act 1967 s 103*

The appellant was appointed receiver and manager of Carah Enterprise Sdn Bhd ('the company') pursuant to the provisions of a deed of debenture executed by the company. The respondent, the Director General of the Inland Revenue Department ('the Director General'), had caused to be issued to the company, notices of assessment for the years of 1993 and 1994 and various notification of increase in income tax. Consequently, the appellant filed an originating summons pursuant to s 183(3) of the Companies Act 1965 ('the Act') to seek directions of the court on whether, federal tax had priority over payments to be made to the debenture holder in a receivership. The High Court decided in favour of the respondent and ruled that the receiver and manager should pay the federal tax first before making payments to the debenture holder. This was the appellant's appeal.

Held, allowing the appeal:

(1) In the case of an appointment of a receiver on behalf of a debenture holder, not being in the course of a winding up of the company, the payments mentioned in s 191(1) of the Act would be paid in priority to the claim of the debenture holder in the order of priority stated in s 292 of the Act. Federal tax and claims of the debenture holder were not included in s 191 of the Act and where s 191 of the Act excludes a particular debt, the ranking regarding it as provided in s 292 of the Act simply did not apply (see pp 609A–B, 614E).

(2) The debt in this appeal was income tax, a federal tax. It is not one of the preferential debts provided under s 191 of the Act. The ranking provided in s 292 of the Act could not come into play. In

following *Raja Arshad bin Tun Uda & Anor v Director-General of Inland Revenue* [1990] 1 MLJ 106, *Abdul Samad bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 58 and *Kenneth Teh Ah Kiam & Anor (Receivers and Managers of Global Pacific Textile Industries Sdn Bhd, in receivership) v Ketua Pengarah Jabatan Kastam & Eksais & Ors* [1998] 1 MLJ 289, the court looked at the taxing statue (s 103 of the Income Tax Act 1967) and found that there was no mention of priority. The respondent could not rely on s 103 of the Income Tax Act 1967 to claim priority. In the circumstances, income tax due to the respondent had no priority over claims of the debenture holder (see pp 614I, 615A–H).

[Bahasa Malaysia summary

Perayu telah dilantik sebagai penerima dan pengurus Carah Enterprise Sdn Bhd ('syarikat tersebut') menurut peruntukan-peruntukan satu suratikatan debentur yang disempurnakan oleh syarikat tersebut. Responden, Ketua Pengarah Inland Revenue Department ('Ketua Pengarah tersebut'), telah menyebabkan notis-notis penilaian bagi tahun-tahun 1993 dan 1994 dan pelbagai pemberitahuan tentang kenaikan cukai pendapatan dikeluarkan kepada syarikat tersebut. Berikuan itu, perayu telah memfailkan satu saman pemula menurut s 183(3) Akta Syarikat 1965 ('Akta tersebut') memohon arahan-arahan daripada mahkamah tentang sama ada, cukai persekutuan lebih penting daripada pembayaran-pembayaran yang perlu dibuat kepada pemegang debentur dalam satu penerimaan. Mahkamah Tinggi telah membuat keputusan menyebalahi responden dan mengarahkan penerima dan pengurus patut membayar cukai persekutuan terlebuh dahulu sebelum membuat pembayaran-pembayaran kepada pemegang debentur. Ini adalah rayuan perayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Dalam keadaan di mana terdapat satu perlantikan seorang penerima bagi pihak seorang pemegang debentur, yang bukan dalam proses satu penggulungan syarikat, pembayaran-pembayaran yang dinyatakan dalam s 191(1) Akta tersebut perlu dibayar dahulu mengikut keutamaannya daripada tuntutan pemegang debentur sebagaimana yang dinyatakan dalam s 292 Akta tersebut. Cukai persekutuan dan tuntutan-tuntutan oleh pemegang debentur tidak terdapat di dalam s 191 Akta tersebut dan di mana s 191 Akta tersebut mengecualikan suatu hutang tertentu, kedudukan mengenainya sebagaimana yang diperuntukkan dalam s 292 Akta tersebut sememangnya tidak terpakai (lihat ms 609A–b, 614E).

(2) Hutang dalam rayuan ini adalah cukai pendapatan, iaitu cukai persekutuan. Ia bukan satu daripada hutang-hutang utama yang

diperuntukkan di bawah s 191 Akta tersebut. Senarai keutamaan yang diperuntukkan dalam s 292 Akta tersebut tidak terpakai. Dalam mengikut *Raja Arshad bin Tun Uda & Anor v Director-General of Inland Revenue* [1990] 1 MLJ 106, *Abdul Samad bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 58 and *Kenneth Teh Ah Kiam & Anor (Receivers and Managers of Global Pacific Textile Industries Sdn Bhd, in receivership) v Ketua Pengarah Jabatan Kastam & Eksais & Ors* [1998] 1 MLJ 289], mahkamah melihat kepada statut cukai (s 103 Akta Cukai 1967) dan mendapati bahawa tiada apa-apa disebutkan tentang keutamaan. Responden tidak boleh bergantung kepada s 103 Akta Cukai 1967 untuk menuntut keutamaan. Dalam keadaan demikian, cukai pandapatan yang perlu dibayar kepada responden tidak mempunyai keutamaan ke atas tuntutan-tuntutan pemegang debentur (lihat ms 614I, 615A–H).]

Notes

For cases on payment of tax, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2107–2109.

For cases on priorities on receivership, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 507–520.

Cases referred to

Abdul Samad bin Hj Alias v The Government of Malaysia & Ors [1996] 3 MLJ 581 (refd)

Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Diraja, Malaysia, Johore Bharu [1991] 1 MLJ 360 (refd)

Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600 (refd)

Global Pacific Textile Indutries Sdn Bhd (In receivership) v Ketua Pengarah Jabatan Kastam dan Eksais & Ors [1994] 3 MLJ 175 (refd)

Golden Palace Musical Hall Sdn Bhd, Re [1988] 2 MLJ 634 (refd)

Kenneth Teh Ah Kiam & Anor (Receivers and Managers of Global Pacific Textile Industries Sdn Bhd, in receivership) v Ketua Pengarah Jabatan Kastam & Eksais & Ors [1998] 1 MLJ 289 (refd)

Ler Cheng Chye (Liquidator of Casterwell Sdn Bhd, in liquidaton) v Director of Customs, Federal Territory [1992] 2 CLJ 1019 (refd)

Raja Arshad bin Tun Uda & Anor v Director-General of Inland Revenue [1990] 1 MLJ 106 (refd)

Legislation referred to

Companies Act 1965 ss 183(3), 191, 291, 292(1)
Customs Act 1967
Employees Provident Fund Act 1991

Government Proceedings Act 1956 s 10
Income Tax Act 1967 ss 103, 106(3)
Real Property Gains Tax Act 1976 s 21B(1)(a)
Sales Tax Act 1972 ss 23, 69, 70
Service Tax Act 1975 s 52
Service Tax (Amendment) Act 1999 (Act A1060)

Shanti Mogan (*Rajkumar Mathusuthanan* with him) (*Shearn Delamore & Co*) for the appellant.

Abu Tariq Jamaluddin (*Muazmir Mohd Yusof* with him) (Legal Officer, Inland Revenue Board) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): The appellant (plaintiff in the High Court) was appointed receiver and manager of Carah Enterprise Sdn Bhd ('the company') vide a deed of appointment dated 9 February 1994 executed by Perdana Merchant Bankers Bhd ('Perdana'). Notice of appointment was given on 14 February 1994 by filing the requisite notice in Form 59 with the registrar of companies.

The appointment was pursuant to the provisions of the deed of debenture dated 30 June 1992. The debenture was executed by the company as security for a term loan facility pursuant to a facility agreement dated 30 June 1992 in favour of Perdana in its capacity as agent for the syndicate lenders.

The respondent (the defendant in the High Court) is the Director General of the Inland Revenue Department, Federal Territory. The respondent had caused to be issued to the company a notice of assessment for the year of 1993; a notification of increase in income tax dated 31 January 1994 in which the income tax payable for the year of assessment 1993 was increased; notice of assessment for the year of assessment 1994 dated 28 December 1994 stating the income tax payable by the company for the year of assessment 1994; and a notification of increase of income tax for the year of assessment 1994 dated 28 December 1994.

The appellant filed an Originating Summons No R1–24–34–1995 pursuant to s 183(3) of the Companies Act 1965 ('the Act') to seek directions of the court in relation to the priority to be accorded to a claim by the Director General of Inland Revenue Department for payment of income tax which had become payable, or will become payable by the company. The directions sought were, inter alia:

(1) whether there is an obligation placed on the receiver and manager by virtue of the Income Tax Act 1967 to set aside such sum out of the assets of the company under receivership to provide for income tax payable or thereafter to be payable;

(2) whether payment of income tax is accorded, as a matter of law, priority in a receivership over the debt due to the syndicate lenders, over the receivers and managers expenses, and/or over the receivers

A and managers professional fees arising out of the performance of his duties; and

(3) if income tax is accorded such priority, then what level of priority is to be accorded by the receiver and manager as compared to the other preferential debts specifically mentioned by a reading of ss 191 and 292 of the Act or whether income tax takes precedence over all such preferential debts.

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However, in the course of the hearing in the High Court, in transpired that only one issue had to be answered and that is: whether in a receivership federal tax has priority over payments to be made to the debenture holders.

C The learned judge decided in favour of the respondent. He held that as the company was under a receivership (as against a winding up) the question whether a federal tax is a preferential debt or not did not arise. Federal tax has to be paid in accordance with the relevant tax law. He therefore ruled that the receiver and manager should pay the federal tax first before making payments to the debenture holders. The learned judge relied D on *Raja Arshad bin Raja Tun Uda & Anor v Director-General of Inland Revenue* [1990] 1 MLJ 106 (SC) and *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600.

Perhaps, at this stage, for convenience, the relevant provisions of the E Act should be reproduced.

Section 191 of the Act provides:

(1) where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a F floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages, salary, vacation leave or superannuation or provident fund provision and any amount which in a winding up is payable in pursuance of section 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person G taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.

(2) For the purposes of subsection (1) the references in section 292(1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as H a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

I Section 292 of the Act, inter alia, provides:

(1) Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under section 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 281; A

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred ringgit or such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up; B C

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up; D

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and E

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

(2) The debts in each class specified in subsection (1) shall rank in the order therein specified but as between debts of the same class shall rank equally between themselves, and shall be paid in full, unless the property of the company is insufficient to meet them, in which case they shall abate in equal proportions between themselves. F

(3) Where any payment has been made to any employee of the company on account of wages, salary or vacation leave out of money advanced by a person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee would have been entitled to priority in the winding up has been diminished by reason of the payment, and shall have the same right or priority in respect of that amount as the employee would have had if the payment had not been made. G H

Reading these two sections, the first thing that strikes my mind is that nowhere do the two sections talk about priority of payment to debenture holders. Section 292 of the Act lists down the priorities in which federal tax ranks sixth. Payments to debenture holders is not one of them. Section 191 of the Act, in essence, says that where a receiver is appointed not in the course of a winding up, debts which in every winding up are preferential I

A debts and are due by way of wages, salary, vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of s 292(3) or (5) of the Act shall be paid out in priority to any claim for principle or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts. In other words, all B those payments mentioned in s 191(1) of the Act shall be paid in priority to the claim in respect of debentures and they are to be paid in the order of priority as provided by s 292 of the Act. But, federal tax is not one of the payments mentioned in s 191 of the Act. So are claims in respect of debentures. What it means is that s 191 of the Act does not provide for C priority as between the two. Of course, if the company is wound up, then federal tax ranks sixth, but claims in respect of debentures are not mentioned, meaning that such claims are not even in the list of priorities. So the only conclusion that can be arrived at, in the case of a winding up, federal tax has priority over claims in respect of debentures, because, though sixth in the order of priority, it is a priority while the claims in D respect of debentures are not.

But, what is the position in the case of an appointment of a receiver, not being in the course of a winding up of the company?

I shall now look at the case law. I shall take them in chronological order.

In *Re Golden Palace Musical Hall Sdn Bhd* [1988] 2 MLJ 634, the E applicant was appointed a receiver of the company in question pursuant to powers contained in a debenture dated 5 November 1983 issued to Kwong Yik Bank Bhd. The receiver managed to recover from some insurance company a sum of RM295,000. The Department of Royal Customs and Excise claimed a sum of RM103,520 being arrears of service tax inclusive of penalty and late payments in priority to all other claims including the F claim for principal and interest from the bank as debenture holder in the sum of RM560,480. Peh Swee Chin J (as he than was) held that the claim by the Department of Royal Customs & Excise must be paid first before the claim for the said principal and interest of the debenture holder ie the bank.

G In the course of his judgment, the learned judge referring to s 191 of the Act, said at p 635:

> The status of a federal tax as a preferential debt has thus been deliberately omitted from section 191, and would appear at first not to be such a preferential debt on the appointment of a receiver.

H I agree with that statement.

However, relying on s 52 of the Service Tax Act 1975 the learned judge held that service tax has priority over claims by debenture holders. Section 52 of the Service Tax Act 1975, as it was then, provides:

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> Where a receiver is appointed of the property of a taxable person to whom a licence under section 8 or 8A is issued the receiver shall give notice thereof to the Director General within fourteen days after the appointment being made and shall before disposing of any of the assets of that taxable person set

> aside such sum out of the assets as appears to the Director General to be sufficient to provide for any service tax that there is or will thereafter become payable in respect of the taxable service that have been provided by that taxable person before the appointment of the receiver, and shall pay such service tax.

Of that provision the learned judge said at p 635:

> Section 52(1) is couched in peremptory language, such that the receiver must set aside, *before disposing of any of the assets*, such sum as to be sufficient to pay for the service tax. To set aside must, in my view, necessarily imply that such sum set aside will have to be paid out to the said department. (Emphasis added.)

It is interesting to note that in spite of the decision in favour of the department, that section was amended by the Service Tax (Amendment) Act 1999 (Act A1060), by, inter alia, adding the words 'and shall pay such service tax' at the end of sub-s (1).

Raja Arshad is a decision of the Supreme Court. The facts and the decision are sufficiently summarised in the headnote:

> In this case, the appellants had been appointed receivers and managers of a company which was indebted to a bank. The appellants' predecessors as receivers and managers had sold the only asset of a company, a landed property. The total purchase price had been paid to the receivers. The respondents, the Director-General of Inland Revenue, claimed payment of real property gains tax. The appellants applied to the High Court for directions and the learned judge of the High Court held that the respondents were entitled to the amount claimed. The appellants appealed.
>
> **Held**, dismissing the appeal:
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> The purchaser of the property in this case who was the acquirer under s 2 of the Real Property Gains Tax Act 1976 was statutorily bound to retain the sum payable by the company as real property gains tax until the acquirer receives the certificate of clearance under the Act and as the acquirer had not complied with what it was statutorily bound to do under the Act and had instead passed the whole amount of the purchase price to the receivers, the receivers had received a sum part of which they ought not to have received. The respondent was entitled to the sum being the amount of tax payable on the disposal of the land property. As far as the tax is concerned, the question of priority does not arise.

It is to be noted that s 21B(1)(a) of the Real Property Gains Tax Act 1976 relied on by the Supreme Court in arriving at the conclusion that it did, provides:

> (1) Where on a disposal to which section 13 applies, the consideration consists wholly or partly of money —
>
> (a) the acquirer shall, until he receives the Director-General's certificate of clearance under section 21A, retain the whole of that money or a sum not exceeding five percent of the total value of the consideration whichever is the less;

Hashim Yeop A Sani CJ (Malaya), delivering the judgment of the court explains at p 107:

A There is no real lacuna in the law. In a winding up, federal tax ranks sixth as preferential debt as referred to earlier, ie by virtue of s 292(1) of the Companies Act 1965. Where, however, there is no winding up and a receiver and manager is appointed as in this case, the federal tax is to be paid in accordance with the taxing statute concerned.

It is not therefore a question of whether the federal tax is a preferential B debt. It is only a question of how and when that tax becomes payable and should be paid by the company being the 'chargeable' person under the Act.

In *Anuarul Aini & Anor v Ketua Pengarah Kastam dan Eksais Diraja, Malaysia, Johore Bahru* [1991] 1 MLJ 360, James Foong JC (as he then C was) considered the provision of s 70 of the Sales Tax Act 1972, which, in so far as it is material, is identical to the provision of s 52 of the Service Tax Act 1975. The learned judge held that s 70 of the Sales Tax Act 1972 standing on its own does not provide a priority payment to sales tax. The learned judge referred to *Re Golden Palace*, but, with respect, his view of that judgment is unclear. He, however, found that 'sales tax being a debt owed D to the government ranks in priority over the fixed charge of the debenture holders', relying on s 10 of the Government Proceedings Act 1956. No reference was made to *Raja Arshad*.

This case (*Anuarul Aini*) went on appeal to the Supreme Court and was 'summarily upheld' — see *Kenneth Teh Ah Kiam & Anor (Receivers and Managers of Global Pacific Textile Industries Sdn Bhd, in receivership) v* E *Ketua Pengarah Jabatan Kastam & Eksais & Ors* [1998] 1 MLJ 289, at p 297 (FC).

In the following year, 1992, in *Ler Cheng Chye (Liquidator of Casterwell Sdn Bhd, in liquidation) v Director of Customs, Federal Territory* [1992] 2 CLJ 1019, Zakaria Yatim J (as he then was) had the occasion to consider the F provision of s 69 of the Sales Tax Act 1972, which, in so far as it is material, is identical in wording with s 70 of the Sales Tax Act 1972. The learned judge followed the view of James Foong J in *Annuarul Aini* regarding the effects of s 70 of the Sales Tax Act 1972 on priority ie it 'does not confer priority rights over other things.'

G Again *Raja Arshad* was not referred to by the learned judge.

On appeal (see [1995] 2 MLJ 600), the Supreme Court held that s 69 of the Sales Tax Act 1972 was directive in nature and merely directs the setting aside of moneys sufficient for taxation, but does not provide that government debts shall rank in priority to all other secured debts. The case being a winding up case, the Supreme Court held that the proper provisions H to apply in deciding the priority of payments in respect of the sales tax debt were ss 291 and 292 of the Act.

I do not think that I have to discuss *Global Pacific Textile Industries Sdn Bhd (In receivership) v Ketua Pengarah Jabatan Kastam dan Eksais & Ors* [1994] 3 MLJ 175, as it was decided prior to the Supreme Court decision I in *Ler Cheng Chye* and as it was also a winding up case.

The issue regarding the priority of sales tax was considered again by the Federal Court in *Abdul Samad bin Hj Alias v The Government of Malaysia &*

Ors [1996] 3 MLJ 581. In that case, the appellant was appointed by the United Asian Bank as the receiver and manager of Rajiv Enterprises Sdn Bhd pursuant to the terms of a debenture. On the issue of sales tax, the government claimed that they were entitled to priority by reason of s 70 of the Sales Tax Act 1972 or s 10 of the Government Proceedings Act 1956. The Federal Court held:

> **Held**, allowing the appeal
>
> (1) It must now be regarded as settled that ss 69 and 70 of the 1972 Act do not operate to confer any priority for sales tax over other debts and that s 292(1) of the 1965 Act must be read as an exception to the general provisions of s 10(1) of the 1956 Act (see p 591F), *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 followed.
>
> (2) It is erroneous to say that the provisions of ss 191 and 292 of the 1965 Act do not apply. Once a receiver has been appointed, ss 191 and 292 will come into play. Whilst it is true that a taxable person collects the sales tax for the government, the government cannot claim priority over such monies once a receiver has been appointed. The argument will be tenable only if the monies collected by Rajiv as sales tax were put into a separate special account. But, there is no evidence that monies collected as sales tax were put into such an account. They must have been put into the mixed account of Rajiv (see pp 591I and 592A-B).

It is not for me to comment on the reasons given in the last three sentences quoted above. It is also not for me or this court to disagree with the decision of the Supreme Court that ss 69 and 70 of the Sales Tax Act 1972 do not operate to confer priority for sales tax over other debts. I also have no problem agreeing that once a receiver has been appointed, ss 191 and 292 of the Act come into play. But, that statement must be understood to mean that s 292 of the Act applies in so far as it is provided by s 191 of the Act. In other words, in a s 191 situation, s 292 is only applicable to debts specifically mentioned in s 191 and federal tax is not one of them.

In the following year, the Federal Court decided the case of *Kenneth Teh Ah Kiam*. The appellants were appointed by the debenture holders as receivers and managers of the debtor company. The value of realizable assets in their hands, including the value of goods seized by the customs department under the Sales Tax Act 1972 prior to the date of crystallization of the debentures, were insufficient to meet all the claims of the debenture holders, the Director General of Customs and Excise, the Employees Provident Fund Board and their own claims of professional fees and expenses incurred in the receivership. The respondents had claimed priority of payment under the relevant provisions of the Customs Act 1967, the Sales Tax Act 1972, the Employees Provident Fund Act 1991 and under s 10 of the Government Proceedings Act 1956. On the contrary, the appellants relied on s 191 read together with s 292(1) of the Act to claim for higher priorities for their own professional costs and expenses of receivership as well debts due to the debenture holders.

Held, allowing the appeal in part:

(1) The provision of s 292 of the Companies Act 1965 must necessarily prevail over the provision of s 10 of the GPA on priority of payment in a liquidation situation, and the same applied to a receivership situation by virtue of s 191 of the Companies Act 1965 (see p 300H); *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation)* [1995] 2 MLJ 600 and *Abdul Samad bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 581 followed.

(2) Sections 23, 69 and 70 of the STA have nothing at all to do with the issue of priority of payment. Thus, unless s 10 of the GPA is successfully brought into operation, there is nothing in the STA itself to confer any priority of payment to the unsecured debts due to the federal government. Since it was conceded that s 10 of the GPA had no application, federal tax assessed under the STA could not claim overall priority of payment without contravening s 292(1) priorities. Similarly, there is nothing in ss 11 and 65 of the CA to give priority of payment of customs duties as unsecured debts to the government. Again, the inability to invoke s 10 of the GPA would cripple the respondent's case. As such, the priority of payment in respect of federal taxes assessed under any written law must rank in accordance with s 292(1) of the Companies Act 1965. In the circumstances, the trial judge erred in law in directing the customs duties and the sales taxes leviable against the debtor company to have priority of payment over debts due to the debenture holders and the receiver's costs and expenses (see pp 300I and 301A–E).

(3) Section 51 of the EPF Act has nothing to do with priority of payment in a receivership or liquidation of a company. There is nothing in the EPF Act itself to give priority of payment to the EPF Board. On the contrary, s 191(1) of the Companies Act 1965 itself confers priority to EPF contributions payable by the employer over any claim of the debenture holders. In the circumstances, the EPF contributions in the present appeal must necessarily fall under s 292(1)(e) of the Companies Act 1965 for purpose of priority over all other unsecured debts in the event where there is insufficiency of realizable assets in the floating charge to meet all claims. Since EPF contributions are expressly included for priority purposes under s 191(1), there is no reason why such contributions should be excluded form s 292(1) unless expressly so provided by Parliament. In the circumstances, as far as the claim of the EPF board was concerned, the order of the trial judge should be set aside on the ground that the contributions under the EPF Act payable by the debtor company do not have priority over the receivers' cost and expenses under s 292(1) of the Companies Act 1965, although they do have priority of payment over debts due to the debenture holders in respect of principal or interest under the debentures (see p 302C–G).

With regard to sales tax, even where there are provisions as in ss 23, 69 and 70 of the Sales Tax Act 1972, the Federal Court in *Kenneth Teh Ah Kiam* held that such provisions have nothing to do with the issue of priority of payment and the federal tax assessed under the Sales Tax Act 1972 cannot claim priority over claims by debenture holders. An exception is where s 10 of the Government Proceedings Act 1972 'is successfully brought into

operation.' It should be noted that in that case (*Kenneth Teh Ah Kiam*) that section did not apply. A

Again, surprisingly, no reference was made to *Raja Arshad*, a judgment of the Supreme Court where a similar provision in the Real Property Gains Tax Act 1976 was in issue.

However, I must confess that I find it difficult to understand this passage of the judgment in *Kenneth Teh Ah Kiam* at p 298: B

> The principle on priority of payment in *Ler Cheng Chye* was thus extended and applied to a receivership situation by *Abdul Samad* by virtue of s 191 read together with s 292 of the Companies Act 1965 ...

in regard to federal taxes. C

And also this passage at p 301:

> Under s 292(1) read with s 191 of the Companies' Act 1965, the customs duties and sales taxes in the form of government taxes would rank sixth in terms of priority of payment to all other unsecured debts.

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As I understand it, if a company is wound up, then federal taxes ranks sixth in priority by virtue of s 292(1) of the Act. That is clearly provided for. But, where a receiver and manager is appointed not in the course of a winding up under s 191 of the Act, the preferential debts enumerated in s 191 of the Act do not include federal taxes. True that s 191 of the Act is to be read with s 292 of the Act. But to what extent? It can only be to the extent provided by s 191 of the Act, ie in regard to the preferential debts mentioned therein the ranking of which will be as provided in s 292 of the Act. But where s 191 of the Act excludes a particular debt, the ranking regarding it as provided in s 292 of the Act simply cannot apply. There is nothing to apply to. Note that even sub-s (2) of s 191 of the Act which makes specific reference to paras (b), (c), (d) and (e) of s 292(1) of the Act omits para (f) which is federal tax. E F

In this respect, if I have a choice, I would prefer the view of Hashim Yeop A Sani CJ (Malaya) in *Raja Arshad* when, delivering the judgment of the Supreme Court, at p 107:

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> In a winding up, federal tax ranks sixth as preferential debt ... by virtue of s 292(1) of the Companies Act 1965. Where, however, there is no winding up and a receiver and manager is appointed as in this case, the federal tax is to be paid in accordance with the taxing statute concerned.

In other words, in respect of federal tax, where a receiver and manager is appointed under s 191 of the Act, s 292 of the Act does not come into play because federal tax is not a preferential debt under s 191 of the Act. That, in my view and with respect, is the correct position. H

It is hoped that this case will give the Federal Court another opportunity to look at the provisions of ss 191 and 292 of the Act again in respect of federal tax and in view of the fact that *Raja Arshad* appears to have escaped the notice of the Federal Court when deciding *Abdul Samad* and *Kenneth Teh Ah Kiam*. I

Coming back to the present appeal. The debt here is income tax, a federal tax. It is not one of the preferential debts provided under s 191 of the Act. The ranking provided in s 292 of the Act cannot come into play. So ss 191 and 292 of the Act cannot be relied on to give priority to federal tax over claims in respect of debentures.

Following *Raja Arshad*, indeed, the Federal Court in *Abdul Samad* and *Kenneth Teh Ah Kiam* did the same, I shall now look at the taxing statute concerned, ie the Income Tax Act 1967. Section 103 of the Income Tax Act 1967 provides:

> (1) Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed ... *be due and payable* at the place specified in that notice, whether or not that person appeals against the assessment. (Emphasis added.)

All it says is that the tax assessed, upon the service of the notice of assessment, becomes due and payable. How is it to be recovered? The most common method is provided by s 106.

> (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

True that in any proceeding for the recovery of the tax assessed the court shall not entertain any plea that the amount of the tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased – s 106(3). That is because there is a different forum for such challenges. But, the fact remains that the tax only becomes due and payable upon service of the notice of assessment. That is all. It has nothing to do with priority.

This provision is even weaker than s 69 or 70 of the Sales Tax Act 1972 which have been held by the Federal Court in *Abdul Samad* and *Kenneth Teh Ah Kiam* as not having created a priority. Even if *Raja Arshad* is still good law, the provision of s 103 of the Income Tax Act 1967 is nowhere near or similar to the provisions of s 21B(1)(a) of the Real Property Gains Tax Act 1976.

So, in my view, the respondent cannot rely on s 103 of the Income Tax Act 1967 to claim priority.

I do not think I have to discuss the effects of s 10 of the Government Proceedings Act 1956 as the respondents did not rely on it. Even the learned judge did not touch on it in his grounds of judgment. I believe the reason is that, as stated by learned counsel for the appellant, it is not applicable.

In the circumstances, I hold that the income tax due to the respondent has no priority over the claims of the debenture holders. The appeal should be allowed with costs here and in the court below and the deposit to be refunded.

Both my learned brothers, Mohd Noor Ahmad and PS Gill JJCA, have read this judgment in draft and have expressed their agreement. A

Appeal allowed.

Reported by Lim Lee Na

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